Supreme Court, U.S.
FILED

No. 98 1251 JAN 28 1999

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

WYTISHA SHANTA CARTER,

Petitioner,

v.

SAM ALLEN,

Respondent .

PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Wytisha Shanta Carter, Pro Se
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Jonesboro, GA 30236
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33 pp

QUESTION PRESENTED

Whether the statue of limitations for a Section 1983 action is tolled at the time the complaint is filed.

PARTIES TO THE PROCEEDINGS

1. Wytisha Shanta Carter, Petitioner
2. Sam Allen, Respondent

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Petitioner, Wytisha Shanta Carter, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeal for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeal for the Eleventh Circuit is found in Appendix C. The opinion of the district court is found in Appendix D.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on August 25, 1998. A timely petition for rehearing was denied on October 30, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. Section 1983 provides in relevant part:

> Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. Course of the Proceedings.

On or about March 29, 1996, petitioner, Wytisha Carter, filed her initial Section 1983 action against the respondent,

alleging that he violated petitioner's Fourth Amendment rights when the respondent arrested her without probable cause on April 2, 1994 and subjected her to excessive force upon her person. This complaint was filed on October 13, 1996. The respondent moved to dismiss the complaint on the ground that it was not timely served pursuant to Rule 4(m). The district court granted the motion to dismiss "without prejudice" on or about December 2, 1996. Following the dismissal, petitioner refilled her Section 1983 complaint against the respondent on December 20, 1996. The respondent moved to dismiss this complaint on the ground that it was barred by the two-year statute of limitations. After hearing oral arguments on May 6, 1997, the district court dismissed petitioner's second 1983 complaint. Petitioner filed her motion for reconsideration on July 2, 1997. The district court refused to considered this motion on the ground that petitioner's notice of appeal, filed July 10, 1997,divested the court of jurisdiction over the case.

On or about August 25, 1998, the panel affirmed the decision of the lower court. On or about October 30, 1998, the petition for rehearing was denied.

Statement of the Facts

On April 2, 1994, the respondent entered appellant's home, without a warrant, and unlawfully seized petitioner and her two children. After the seizure, the respondent transported petitioner and her children to a county homeless shelter. As petitioner stood on the stairs inside the shelter, holding one child in her arms, the respondent grabbed her, threw her and the child down the stair steps to the floor and jumped on top petitioner. After physically restraining petitioner, the respondent lifted her from the floor, carried her outside the shelter, placed her inside his patrol car and transported her to the county jail without probable cause.

The respondent charged respondent with interference with custody and obstruction of a law enforcement officer. **Id.** Petitioner suffered bodily injuries when she was incarcerated at the jail, but she was not provided with any medical treatment. After petitioner was released from jail, several hours after her arrest, she went to the local hospital for emergency medical

treatment. The interference and obstruction charges were later dismissed.

At the time of petitioner's arrest on April 2, 1994, she was seventeen (17) years of age. Petitioner 's eighteenth (18) birthday was on November 14, 1994. Petitioner lived with her mother at the time of her arrest.

ARGUMENT

A. The statute of limitations for a section 1983 Action Is Tolled At The Time The Complaint Is Filed.

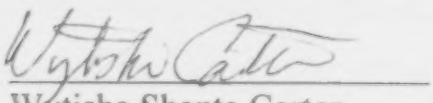
The Eleventh Circuit Court of Appeals held that the statute of limitations was not tolled when the petitioner filed her initial Section 1983 complaint. This holding conflicts with a holding by the Tenth Circuit Court of Appeals concerning a similar issue. In Metropolitan Paving Co. v. International Union of Operating Engineers, 439 F.2d 30 (10th Cir. 1971), cert. denied, 404 U.S. 289, 92 S. Ct. 68, (1971), the Court held that where a federal cause of action is involved, the statute of limitations is tolled at the time the complaint is filed.

This Court should review this appeal to resolve the conflicting holdings of the two circuits concerning the time when the statute of limitations is tolled in a federal action.

Wherefore, the petitioner requests that her petition for certiorari be granted.

This 28th day of January, 1999.

Submitted by



Wytisha Shanta Carter

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Appendix A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-8816

WYTISHA SHANTA CARTER,

Plaintiff-Appellant,

versus

SAM ALLEN,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Georgia

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19 __, _____ F. 2d _____).

BEFORE: ANDERSON, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-8816

Non-Argument Calendar

District Court Docket No. 5:96-CV-498-1 (DF)

WYTISHA SHANTA CARTER,

Plaintiff-Appellant,

versus

SAM ALLEN,

Defendant-Appellee.

Appeal from the United States District Court

for the Middle District of Georgia

Before ANDERSON, DUBINA and BLACK, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the District Court appealed from in this cause be and the same is hereby AFFIRMED.

IT IS FURTHER ORDERED THAT the plaintiff-appellant pay to the defendant-appellee, the costs on appeal to be taxed by the Clerk of the Court.

Entered: August 25, 1998

For the Court: Thomas K. Kahn, Clerk

By: _____

Deputy Clerk

ISSUED AS MANDATE: Nov. 20, 1998

Appendix C

[DO NOT PUBLISH]

No. 97-8816

Non-Argument Calendar

District Court Docket No. 5:96-CV-498-1 (DF)

WYTISHA SHANTA CARTER,

Plaintiff-Appellant,

versus

SAM ALLEN,

Defendant-Appellee.

Appeal from the United States District Court

for the Middle District of Georgia

(August 25, 1998)

Before ANDERSON, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

Plaintiff Wytisha Carter appeals the district court's dismissal of her civil rights action brought under 42 U.S.C. §§ 1983, 1985(3), and 1988, alleging that Defendant Sam Allen arrested her without probable cause and used excessive force during the arrest. For the reasons set forth below, we affirm.

I. BACKGROUND

On March 29, 1996, Carter filed a complaint identical to the one filed in the present case. In that prior action, Carter did not serve Allen until 200 days after the complaint was filed. Allen moved to dismiss the case based upon Federal Rule of Civil Procedure 4(m), which requires services within 120 days of the filing of the complaint. The district court found that Carter made no showing of good cause for her failure to timely serve Allen and therefore dismissed the case without prejudice.

Carter then brought the present action and served Allen in a timely manner. Allen again filed a motion to dismiss, this time asserting that the statute of limitations barred Carter's claims. The district court agreed and granted the motion. Carter now appeals, asserting that the statute of limitations had not run and,

alternatively, that her claims are valid under Ga. Code Ann. § 9-2-61, Georgia's renewal statute.

II. ANALYSIS

Federal courts measure the timeliness of actions brought under 42 U.S.C. §§ 1983 and 1985 according to the personal injury limitations period of applicable state law. *Wilson v. Garcia*, 471 U.S. 261, 276, 105 S. Ct. 1938, 1947 (1985). In Georgia, the statute of limitations for personal injury claims is two years. Ga. Code Ann § 9-3-33. Carter thus had two years from the time her cause of action accrued to file her suit.

For present purposes, the parties do not dispute that Carter's cause of action accrued when she was arrested on April 2, 1994. Carter filed the complaint in the present case on December 20, 1996. The action was therefore untimely unless the statute of limitations was tolled or Carter can benefit from Georgia's renewal statute.

A. Tolling of the Status of Limitations

At the time of her arrest, Carter was a minor. Under

Georgia law, minority is a legal disability for which the statute of limitations is tolled until the disability is removed. Ga. Code Ann. § 9-30-90. Carter argues that the statute of limitations for her claims was therefore tolled until November 14, 1996, the dated she reached the age of majority. Although Carter's claim likely has merit,[1] we need not resolve this issue. Even if the statute of limitations was tolled until Carter turned 18 years old, Carter's complaint would still be untimely. Carter must therefore provide another rationale to prevail on her claim that the statute of limitations had not run when she filed her complaint.

To this end, Carter argues that the statute of limitations was tolled during the pendency of her first action against Allen. We reject this claim. When a case is dismissed under Rule 4(m), the statute of limitations may bar a refiling of the action. *See Petrucelli v. Bohriger and Ratzinger, GMBH*, 46 F.3d 1298, 1306 (3d Cir. 1995) (finding that "a district court may in its

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1 In *Hardin v. Straub*, 490 U.S. 536, 544, 109 S. Ct. 1998, 2003 (1989), the Supreme Court held the lower courts erred in refusing to apply a Michigan statute that tolled the statute of limitations for plaintiffs suffering from a legal disability. Although the legal disability in *Hardin* was imprisonment, the statute at issue also addressed age and insanity. Nothing in *Hardin* indicated that the Court's holding would not apply equally to these other legal disabilities.

discretion still dismiss the case, even after considering that the statute of limitations has run and the refiling of an action is barred"); *Adams v. AlliedSignal General Aviation Avionics,* 74 F.3d 882, 887 (8th Cir. 1996) (citing *Petrucelli* with approval); *see also* Fed. R. Civ. P.4(m), Advisory Committee's Note (indicating that in deciding whether to grant a Rule 4(m) dismissal, a court may consider whether "the applicable statute of limitations would bar the refiled action."). If this were not the case, a plaintiff could indefinitely extend an action simply by continuing to file complaints without ever serving the defendants.

The statute of limitations was not tolled during the pendency of Carter's initial suit against Allen, and any tolling on account of Carter's age is insufficient to save the present action.

B. **Georgia's Renewal Statute**

Georgia's renewal statute provides:

> When any case has been commenced in either a state or federal court within the applicable statute of limitations and the

> plaintiff discontinues or dismisses the same, it may be recommenced in a court of this state or, if permitted by the federal rules of civil procedure, in a federal court either within the original applicable period of limitations or within six months after the discontinuance or dismissal, whichever is later, ... provided, however, if the dismissal or discontinuance occurs after the expiration of the applicable period of limitation, this privilege of renewal shall be exercised only once.

Ga. Code Ann § 9-2-61(a). This statute is to be "construed liberally to allow renewal where the suit is disposed of on any ground not affecting its merits." *Hobbs v. Arthur,* 444 S.E.2d 322, 323 (Ga. 1994). However, "the privilege of dismissal and renewal statute. *See Black v. Knight,* 499 S.E.2d 69, 71 (Ga. Ct. App. 1998); *see also Scott v. Muscogee County*, 949 F.2d 1122 (11th Cir. 1992) (affirming district court's holding that Ga. Code

Ann. § 9-2-6(a) was inapplicable where defendants were never served with process in original action).

III. CONCLUSION

The statute of limitations was not tolled during the pendency of Carter's initial action against Allen, and Carter cannot claim the benefits of Ga. Code Ann. § 9-2-61(a) because her original suit was void for lack of service. Carter's complaint in this suit is thus untimely. The district court's dismissal is affirmed.

AFFIRMED.

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

WYTISHA SHANTA CARTER,	:	
Plaintiff,	:	
vs.	:	**5:96-CV-498-1(DF)**
SAM ALLEN,	:	
Defendants.	:	

ORDER

The above styled case is a civil rights action brought under 42 U.S.C. §§ 1983, 1985(3) and 1988. In her complaint Plaintiff contends that Defendant arrested her without probable cause of April 2, 1994, and that he subjected her to excessive force in carrying out the arrest. Defendant has responded with a motion to dismiss based on a finding that the statute of limitation has run as to all of Plaintiff's claims. Defendant has also filed a motion for sanctions against Plaintiff's counsel. The court held oral arguments on Defendant's motions on May 6, 1997, and now,

after careful consideration of the entire record in the case, the court enters the following order.

FACTS

Plaintiff fi' :d a complaint identical to the one filed in this case on March 29, 1996 (hereinafter ***Carter 1)***. Plaintiff did not, however, properly serve Defendant with that complaint until well over 200 days after the complaint was filed. Defendant filed a motion to dismiss based upon Fed. R. Civ.P. 4(m), which requires that complaints be served within 120 days of their being filed. In its order on the motion, the court found that Plaintiff did not showing of good cause for her failure to timely serve Defendant. Consequently, the court dismissed the case without prejudice.[1] Shortly after the court dismissed ***Carter 1,*** Plaintiff filed the above styled action. Plaintiff did timely serve Defendant in the second suit.

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1 Rule 4(m) provides, "If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court ... shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period."

In response to the second complaint, Defendant filed a motion to dismiss based on the statute of limitations. Defendants claims that the statute of limitations ran after ***Carter I*** was filed, but before he was untimely served in ***Carter I*** and before the court dismissed the lawsuit. Plaintiff responds by arguing that the Georgia renewal statute at OCGA § 9-2-61 allows her to file this second lawsuit and, in the alternative, that the statute of limitations not run as to any of her claims.

CONCLUSIONS OF LAW

A. *Motion to Dismiss*

The precedent in this circuit is clear that claims brought under 42 U.S.C. §§ 1983 and 1985 are measured by the personal injury limitations period of the state in which they are brought.[2] ***Rozar v. Mullis***, 85F.3d 556, F.3d 556, 561 (11th Cir. 1996). In this case, Georgia's two year limitation period for personal injury claims governs Plaintiff's lawsuit. While Georgia law determines the limitations period, federal law determines when a federal civil rights claims accrues. ***Id.*** Generally, "The statute

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2 Plaintiff also brings her claims under 42 U.S.C. § 1988. That section, however, defines procedures under which remedies may be sought in civil rights actions. It does not create an independent cause of action.

[of limitations] does not begin to run until the facts which support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." ***Id.*** at 561-62 (quoting ***Mullinax v. McElhenney***, 817 F.2d 711, 716 n. 2 (11th Cir. 1987)). "This rule requires a court first to identify the alleged injuries, and then to determine when plaintiff[] could have sued for them." ***Id***. at 562.

All of the injuries Plaintiff seeks damages for occurred as a result of her arrest on April 2, 1994, by Defendant. Therefore, the court concludes (and Defense counsel does not argue to the contrary) that Plaintiff's claims under §§ 1982 and 1985 accrued on that date. Therefore, Plaintiff had two years from April 2, 1994 to file a claim for her injuries. The instant suit was filed December 20, 1996. Clearly, Plaintiff filed her suit more than two years after her claims had accrued. The question, then, becomes whether the limitation period has been tolled so as to allow Plaintiff to bring her claims.

The limitation periods under Georgia law may be tolled by the state's renewal statute. The statute provides:

> If a plaintiff discontinues or dismisses his case and recommences the same within six months, the renewed case shall stand upon the same footing, as to limitation, with the original case. However, this privilege of dismissal and renewal shall be exercised only once under this Code section.

OCGA § 9-2-61(a). In its briefs Defendant argues that this statute does not apply to the refiling of a federal civil rights claim filed in federal court. The court agrees that, on its face, the statute does not appear to apply to federal cases in federal court. The Eleventh Circuit, however, has suggested that the statute is applicable to federal civil rights claims filed in federal court. In ***Scott v. Muscogee County, Georgia***, 949 F.2d 1122 (11th Cir. 1992), the circuit court affirmed the district court's conclusion that the renewal statute did not apply to the refiling in federal court of the plaintiff's federal civil rights claims. Importantly, however, the reasoning for the holding was the plaintiff had never served the defendants with process in the first lawsuit, therefore the first lawsuit was not a "valid action" and, under the

statute, it could not be renewed. The ***Scott*** analysis persuades this court that it must inquire as to whether or not Plaintiff's case is saved by the renewal statute.[3]

Georgia courts have found that the "privilege" of dismissal and renewal does not apply to cases decided on their merits or to void cases. ***Hobbs v. Arthur***, 444 S.E. 2d 322, 323 (Ga. 1994) (suit is void and incapable of renewal if there has been a judicial determination that dismissal is authorized). Whether a dismissal is an adjudication upon the merits is governed by OCGA § 9-11-41(b). That section provides:

> (1) A dismissal for failure of the plaintiff to prosecute does not operate as an adjudication upon the merits; and (2) Any other dismissal under this subsection and any dismissal not provided for in this Code section, other than a dismissal for lack of

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3 Furthermore, in ***Scott***, the circuit court had previously reversed and remanded the case to the district court because the district court had not considered whether Georgia's renewal statute tolled the statute of limitations in the case.

> jurisdiction or for improper venue or lack of an indispensable party, does operates as an adjudication upon the merits unless the courts in its order for dismissal specifies otherwise.

Like federal courts, Georgia courts dismiss cases that are not timely served. Generally, such dismissals occur when the plaintiff had unreasonably delayed in serving the defendant and, in the time between filing the lawsuit and the defendant's motion to dismiss, the application statute of limitations has run. Under such circumstances the court will find that the timely filing of the complaint did not toll the statute of limitations and consequently, that the statute of limitations requires that the case be dismissed.[4] See, e.g., ***Lowes v. Allstate Inc. Co.,*** 418 S.E. 2d 465 (Ga. App.

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4 Under the federal rules, the timely commencement of a lawsuit will toll the statute of limitations. A lawsuit is commenced when the complaints is filed. ***Fed. R. Civ. P. 3.*** If the plaintiff fails to serve the defendant within 120 days after the filing of the complaint, he will be subject to a motion to discuss under Rule 4(m).

The process in Georgia is slightly different. Normally, the timely filing of the complaint will toll the statute of limitations. A plaintiff has five days after filing his lawsuit to serve the defendant. The five day time period, however, is not absolute. If the plaintiff does not serve the defendant. If plaintiff did not unreasonably delay service, the timely filing of the complaint will not toll the statute of limitations and that statute will require that the case be dismissed. See ***Ingram v. Grose***, 350 S.E. 2s 289 (Ga. App. 1986).

1992) (finding that plaintiff did not exercise due diligence in serving defendant and dismissing case). Under the language of OCGA § 9-11-41, such a dismissal is an adjudication on the merits because it is not a dismissal provided for in that Code section.

In ***Carter I***, this court reviewed whether Plaintiff had unreasonably delayed in serving Defendant process. The court found that Plaintiff had and that dismissal was warranted under Rule 4(m). Such a finding is analogous to the findings that Georgia courts make in the process described above. Accordingly, this court finds that a dismissal such as that entered in ***Carter I*** is an adjudication on the merits and therefore precludes plaintiff from refiling her suit under the Georgia renewal statute.

Plaintiff argues that this conclusion is in error because the court dismissed ***Carter I*** without prejudice. A dismissal without prejudice does not, however, mean that the dismissal is without consequence. ***Conover v. Lein***, 87 F.3d 905, 908 (7th Cir. 1996). In ***Petruceilli v. Bohringer and Ratzinger***, 46 F.3d 1298, 1306

(11th Cir. 1995) the Eleventh Circuit stated that a court may consider whether the statute of limitations had run when deciding whether good cause exists to extend the time for service. That case did not, however, find that the running of the statute of limitations required that the district court extend time for service of process. Thus, the mere fact that ***Carter I*** was dismissed under Rule 4(m), which stated that dismissals shall be made without prejudice, does not entitle Plaintiff to the opportunity to refile a claim which is barred by the statute of limitations.

Plaintiff's second argument against Defendant's motion to dismiss is that the statute of limitations as to her claims has not run. Plaintiff contends that the limitations period was tolled until she reached 18, and was then tolled again while ***Carter I*** was pending. The court, however, disagrees that the limitation period was tolled during the time period that ***Carter I*** was pending. Generally, courts have not tolled the statute of limitations for that period during which a case that was ultimately dismissed under Rule 4(m) was pending. See, e.g. ***Petrucelli***, 46F.3d at 1306 (acknowledging that some dismissals under Rule 4(m) will preclude plaintiffs from recovering because of the bar of the

statute of limitations); ***Burks v. Griffith***, 100 F.R.D. 491, 491 (N.D.N.Y. 1984) (acknowledging that dismissal under Rule 4(m) would result in plaintiff's suit being barred by the statute limitations); ***Forest v. Holland Distributors***, Inc. 824 F. Supp. 87, 88 (M.D. La. 1993) (["D]ismissal under Rule [4(m)] invalidates the previous filing of a lawsuit thereby creating the legal fiction that the suit was never filed"); ***Smith v. Pennsylvania Glass Sand Corp.,*** 123 F.R.D. 648 (D.C. Fla. 1988) (fact that dismissal under Rule 4(m) may time bar plaintiff's claim does not eliminate the requirement of showing good cause). This fact has been noted by Professor Moor in his treatise on federal civil procedure:

> [T]he applicable statute of limitations is tolled by filing alone, timely service of process will preserve the action, but dismissal under Rule 4(j) will result in the action being time-barred if the statute has run after the filing of the complaint.

2 Moore's Federal Practice ¶ 4.46 at 4-574 (2d ed, 1985). A

finding that the statute of limitations was not tolled during the period which ***Carter 1*** was pending is also consistent with the theory of limitations of actions. If the limitations period could be tolled during the pendency of a suit that was ultimately dismissed for failure to timely serve a defendant, a plaintiff could extend the limitations period of an action almost indefinitely simply be continuing to file lawsuits that were never served. The court is reluctant to allow such a practice.

Accordingly, for all the reasons recited above, the court finds that the statute of limitations has run as to all of Plaintiff's claims and that the Georgia renewal statute does not save Plaintiff's claims.

B. *Motion for Sanctions*

The court finds that, while Plaintiff should not prevail in her efforts to refile this lawsuit, her arguments that the Georgia renewal statute allow her to refile this suit are not frivolous. During the course of its research the court found not case that explicitly held that a dismissal under Rule 4(m) of the Federal Rules of Civil Procedures constituted an adjudication on the merits for the purposes of the Georgia renewal statute. As the

law concerning Defendant's motion was not clearly established, the court declines to award Defendant its costs for defending the above styled lawsuit.

CONCLUSION

Defendant's motion to dismiss is hereby **GRANTED.** Defendant's motion for sanctions is hereby **DENIED.**

SO ORDERED, this _____ day of June, 1997.

_____

DUROSS FITZPATRICK, JUDGE
UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED
FEB 23 1999
CLERK

No. 98-1251

In The

Supreme Court of the United States

October Term, 1998

WYTISHA CARTER,

Petitioner,

vs.

SAM ALLEN,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. Statement of Facts and Procedural History

Petitioner filed two actions against Respondent Sam Allen (hereinafter "Allen"). In the first, she failed to serve Allen within 120 days of filing her complaint as required by Federal Rule of Civil Procedure 4. (*Carter I*). The District Court found the complaint in *Carter I* to be void because of the lack of timely service.

Within days of *Carter I*'s dismissal, Petitioner refiled an identical complaint. (*Carter II*). Respondent immediately moved the District Court pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the complaint asserting the statute of limitations had expired. After hearing oral argument, the District Court found the complaint untimely and dismissed it with prejudice. The District Court held Plaintiff was not entitled to utilize the Georgia Renewal Statute, O.C.G.A. § 9-2-61, because Petitioner's first suit had not been voluntarily dismissed.

Petitioner filed a notice of appeal to the United States Court of Appeals for the Eleventh Circuit. Simultaneously, she filed a motion for reconsideration in the District Court attaching her affidavit for the first time asserting she was under the age of 18 when the incident which allegedly forms the basis of this action occurred. The District Court denied the motion for reconsideration because Petitioner's notice of appeal deprived it of jurisdiction.

The United States Court of Appeals for the Eleventh Circuit affirmed the District Court. The Court of Appeals held *Carter I* was judicially declared void by the District

Court dismissal of that action for untimely service. Because there was no valid prior action, Petitioner was unable to utilize the protections of O.C.G.A. § 9-2-61 to renew the prior action. The Court also held the statute of limitations was not tolled during the pendency of *Carter I* since there was no valid suit in *Carter I* to which tolling could attach.

The factual incidents related to the occurrence which gives rise to Plaintiff's complaint are largely irrelevant to the issues presented by this action. However, to the extent the facts are relevant, they are taken as true solely for purposes of Respondent's motion to dismiss in the District Court.

REASONS WHY THE PETITION SHOULD BE DENIED

A. Introduction

The District Court properly dismissed Petitioner's second complaint (*Carter II*). Under no set of facts before the District Court was this complaint timely filed. As aptly put by the District Court, "Absolutely all the kings [sic] men and all the king's horses can't put [H]umpty [D]umpty back together again, and nobody could put that lawsuit back together again once it is filed too late, under the statutes." (T1-11). No issue is presented for this Court to review and Petitioner's petition for a *writ of certiorari* should be denied.

B. The District Court properly dismissed Plaintiff's complaint as untimely filed.

Federal Courts apply the most analogous state statute of limitations when determining what statute of limitations applies to a claim under 42 U.S.C. § 1983. *Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985). In Georgia, the statute of limitations for claims of personal injury under state law is two years. O.C.G.A. § 9-3-33. The Court of Appeals held the two year statute applicable to alleged violations of federally protected rights pursuant to 42 U.S.C. § 1983. *Williams v. City of Atlanta*, 794 F.2d 624 (11th Cir. 1986); *see also, Camps v. Warner Robins*, 822 F. Supp. 724 (M.D. Ga. 1993). Plaintiff had two years from the date her claim arose in which to file her lawsuit.

Petitioner alleges, and Allen does not dispute for purposes of this proceeding, the incident at issue occurred on or about April 2, 1994. (R1-1-2 at ¶¶ 4-5). The District Court correctly concluded a cause of action accrues when a plaintiff knows, or in the reasonable exercise of her rights should know, she may have been harmed. (R1-15-3 (citing *Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987)). *Carter II* was filed December 20, 1996. That date is indisputably more than two years after the incident about which Plaintiff complains is alleged to have occurred. Accordingly, Petitioner's complaint is barred by the statute of limitations and the District Court correctly dismissed this complaint.

C. The District Court correctly found the statute of limitations was not tolled by operation of law, therefore Petitioner's complaint was properly dismissed.

Petitioner's argument asserts the statute of limitations was tolled by operation of law during the pendency of *Carter I*. That assertion was correctly rejected by each of the lower courts. No issue is presented which would suggest probable jurisdiction in this Court or a reviewable opinion on *certiorari*.

Petitioner's assertion the statute of limitations was tolled during the pendency of *Carter I* is without legal foundation. She argues without explication that the opinion of the Eleventh Circuit which affirmed the dismissal of *Carter I* is in conflict with a decision of the Tenth Circuit. (Petition for *certiorari* at 5). She provides the Court no reasons why the decisions are supposedly in conflict. Indeed, her Appendix completely omits the substance of the Circuit Court's opinion which Petitioner seeks to have this Court review.

The Circuit Court's Opinion held that the filing of a lawsuit (*Carter I*) that is judicially determined to be void does not toll the statute of limitations. "[D]ismissal under Rule [4(m)] invalidates the previous filing of a lawsuit thereby creating the legal fiction that the suit was never filed." *Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298, 1306 (3rd Cir. 1995). The dismissal without prejudice is designed to leave the plaintiff in the same position as if the previous lawsuit had never been filed. *Holbun v. Goldberg*, 823 F.2d 399 (5th Cir. 1987); *Johnston v. Ethyl*

Corp., 683 F. Supp. 1059, 1061 (M.D. La. 1988). Commentators have also acknowledged this rule. 4A Wright & Miller, *Federal Practice and Procedure*, § 1137 at 399 (1987). Despite the fact the Federal Rule of Civil Procedure 4(m) dismissal is without prejudice, a subsequent suit is time barred if the statute of limitations expired before the first suit is dismissed. *Norlock v. City of Garland*, 768 F.2d 654, 658 (5th Cir. 1985).

The Lower Courts correctly found the mere filing of the first lawsuit, without proper and timely service, did not operate to toll the statute of limitations. The District Court found this result to be in accordance with and supported by the public policy surrounding the limitation of actions. (R1-15-7 to -8). As the District Court observed, "If the limitations period could be tolled during the pendency of a suit that was ultimately dismissed for failure to timely serve a defendant, a plaintiff could extend the limitations period of an action almost indefinitely simply [by] continuing to file lawsuits that were never served." (R1-15-7 to -8). The Circuit Court adopted this precise language in its Opinion as well. The Courts below correctly declined to countenance such a practice.

Petitioner also asserts the statute of limitation was tolled by reason of her minority at the time of the incident. That argument, raised for the first time on appeal, was properly rejected as well. Under the clear and unequivocal facts in the record, Petitioner turned 18 years old in November 1994. Assuming *arguendo* the statute of limitations was tolled until her 18th birthday, the statute still expired more than a month before the filing of *Carter II*. Petitioner's minority provides no basis for further review by this Court.

Petitioner's result in this action is not of the District Court's making, nor a problem of the Federal Rules of Civil Procedure, nor a conflict in the law of the Circuits. Petitioner argued vociferously in the District Court that she obtained proper service on Allen in *Carter I*. She waited until after the District Court ruled and dismissed her claim before refiling. That decision proved fatal to her claim because the suit was no longer merely voidable but judicially *void*, *Hobbs v. Arthur*, 264 Ga. 359, 360, 444 S.E.2d 322, 323 (1994), and O.C.G.A. § 9-2-61 was incapable of resurrecting her claim as a matter of state law. *Scott v. Muscogee County*, 949 F.2d 1122 (11th Cir. 1992). The District Court's observations to Petitioner's then-counsel at the hearing in this matter bear repeating,

> You know, the thing is, Mr. King, you are admitted to practice law here in the State of Georgia. You are a member of this court. You ought to know, any lawyer ought to know, the most elemental thing is to get proper service. And you get proper service, if it is not acknowledged, by having someone authorized to make service, serve it on the defendant.
>
> And this dragged on all through the late winter, the spring, the summer, the fall, into winter. And finally getting absolutely no cooperation out of you, the court dismissed the lawsuit.
>
> You were, you had many opportunities, alarm bells going off all over the place, telling you something is wrong here. I have got to get this suit properly served. But nothing happened.

(T1-9).

This is not a situation in which this Court needs to fashion a rule to correct an injustice. The injustice would be created were this Court to reverse the Lower Courts. Plaintiff's first lawsuit was found to be void by the District Court. That ruling was not appealed and is presumptively correct. *Carter II* was not timely filed under any theory or argument.

CONCLUSION

The Circuit Court should be affirmed. The Court correctly held *Carter II* is barred by the expiration of the statute of limitations. The statute was not tolled as a result of the filing of her first void lawsuit (*Carter I*). Nor is her present lawsuit timely because of the tolling effect of Plaintiff being a minor at the time of the incident. Finally, the Georgia Renewal Statute provides no haven and basis for allowing *Carter I* to proceed. *Carter I* was judicially determined to be void and as a matter of federal and state law and the statute cannot renew prior actions which are not valid.

There was no error and the District Court's Judgment should be affirmed.

Respectfully submitted,

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* Mr. Balch has applied for admission to the Bar of this Court by letter dated February 17, 1999.